UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

BEBO'S AND KATHY'S CAFE

Respondent

and Case 16-CA-280782

KENNEDY JENNIFER SARTOR, an Individual

Charging Party

Linda Reeder and *Phillip Melton, Esqs.,*
for the General Counsel
Kathy Chandler, Pro Se, for the Respondent

DECISION

STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge. This case virtually was tried via Zoom video technology on May 9, 2022. The complaint alleges that the Respondent, Bebo's and Kathy's Cafe, violated Section 8(a)(1) of the National Labor Relations Act (the Act)[1] by demoting Kennedy Sartor on July 25 and subsequently discharging her on July 30, 2021[2] because she engaged in protected concerted activities by raising group concerns about workplace issues at an employee meeting earlier that day. The Respondent denies the material allegations and asserts that Sartor was discharged for several reasons, including her deficient performance and lack of availability to work more than one day per week.

On the entire record, including my observation of the demeanor of the witnesses,[3] and after considering the briefs filed by the General Counsel and the Respondent, I make the following

[1] 42 U.S.C. § 158(a)(1).

[2] All dates refer to 2021 unless otherwise stated.

[3] The testimony of the General Counsel's witnesses, Sartor and Caliendo, was responsive, consistent, and corroborated by text messages. The Respondent's decision makers on the other hand, Chandler and Morlatt, were generally combative, evasive, contradictory, or nonresponsive. Similarly, the testimony of Respondent's witnesses, employees and former employees—Adryenne Searce, Kaitlyn Jean Smith, Peggy Jean Stanley, and Callie Brighton—was often contradictory or unsupported by credible evidence.

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a limited liability corporation, operates a restaurant establishment with an office and place of business located in Pilot Point, Texas, where it annually derives gross revenues in excess of $500,000, and purchases and receives goods valued in excess of $5,000 from outside Texas. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act..

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Respondent's Operations

The Respondent's restaurant is owned by Kathy Chandler and managed by her daughter, Stephanie Morlatt.[4] The restaurant employs a staff of approximately 20 servers and cooks, which is divided into morning and night shifts. The restaurant's servers perform a range of duties, include waiting on customers, bussing tables, wiping down tables, cleaning and sweeping floors and toilets, cleaning windows, taking out trash, stocking and preparing food items. Many of those duties are supposed to be done at the end of each shift.

The morning shift was managed at the relevant times by Morlatt and Adryenne Searce, while the night shift was managed by Sartor. Servers of in both shifts were paid about two dollars an hour plus tips, while the keyholoder/manager was paid a dollar more, about three dollars an hour plus tips. Both shifts performed largely the same work. In addition to serving customers, the serving staff was responsible for various other tasks. These tasks, referred to as "side work," included cleaning the restaurant, stocking and preparing items needed by servers, mixing and filling condiments, and rolling silverware into napkins.[5]

The COVID-19 pandemic significantly impacted the Respondent's business, causing it to shut down for three months, except for drive-through take-out orders. Thereafter, the restaurant opened at 50% capacity. However, many employees did not return and the restaurant continues to operate understaffed. Due to staffing shortages, Chandler was forced to "take whatever I can get" when trying to find staff, and was "so shorthanded" that there was "no way to just fire" staff. This was still the case as of July 25.[6]

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[4] Chandler and Morlatt are admitted supervisors and agents within the meaning of Section 2(11) and (13) of the Act. The General Counsel contends that Morlatt's presence during the hearing violated the sequestration order. However, at Chandler's request, Morlatt was permitted to assist her in utilizing the computer during the cross-examination of Sartor and Caliendo.

[5] Searce, a current employee and former manager, contradicted Morlatt's vague denial that Sartor received a $1.00 hourly pay increase when she was promoted. (Tr. 12-16, 73-74, 131, 153.).

[6] The finding is based on Chandler's testimony. (Tr. 106-112.) The assertion of Searce, a morning shift server, that the restaurant was overstaffed as of July 30, was not credible and contradicted Chandler's testimony that the restaurant was shorthanded: "We've never really had a bad issue here." Searce did not work the night shift with Sartor and much of her testimony was based on hearsay recitation of the Respondent's contentions, reflecting a strong bias for the Respondent. (Tr. 158-159, 161-162.)

The Respondent's disciplinary policies essentially consisted of coaching. The Respondent did not issue warnings and, as a practical matter, termination was not an option because the restaurant was extremely shorthanded. As a result, Chandler tolerated tardiness, costly errors, and performance deficiencies.[7]

B. Sartor and the Night Shift

Prior to the COVID-19 pandemic, Sartor worked in a salon. After it closed, she applied to work with the Respondent and was hired as a full-time server in April. She worked between five to seven days per week. Sartor started on the night shift and worked Monday through Thursday from 2:00 or 3:00 p.m. to close. Although the restaurant usually closed at 9:00 p.m., the night shift did not finish until they completed cleaning duties around 10:00 p.m. On Friday and Saturday nights, Sartor worked from 3:00 p.m. until about 11:00 p.m. or 12:00 a.m. On Sundays, Sartor worked from 8:00 a.m. to 3:00 p.m., since the restaurant closed early.

At some point, Sartor transitioned to the morning shift for several weeks. Sartor was promoted to keyholder/manager on or around May 22. As keyholder/manager, Sartor worked the weekday evening shifts, and weekend morning and night shifts. She was responsible for completing end of shift paperwork and closing the store. She was provided with a manager's card that enabled her to clock in, edit customer orders, and access certain information on the Respondent's computerized point of sale system. Sometime in June, however, Sartor's salon reopened and she partially resumed salon work. As a result, she asked Morlatt to reduce her schedule to weekends and pickup work only. Morlatt granted the request and Sartor worked about one week under the reduced schedule.[8]

As a keyholder/manager, Sartor also waited on tables. However, she was not authorized to hire, assign, transfer, promote, suspend, or discharge employees. All personnel decisions and actions were usually taken by Chandler and/or Morlatt. Sartor's own disciplinary record was unremarkable. She occasionally arrived late, but Morlatt still promoted her.[9] On one occasion, the Respondent billed both Sartor and another server, Peggy Jean Stanley, for the full price of the shirt Sartor gave Stanley after the latter came in soaked from the rain. There was also an occasion on Saturday, July 4th, when the night staff, including Sartor, were caught drinking from cups

[7] Chandler testified that the pandemic's impact on staffing essentially minimized discipline to the point where "[w]e just talk to each other" because her hands were tied: "What could I do? I couldn't do anything." (Tr. 111-114.)

[8] Sartor's credible testimony that she asked to reduce her schedule to two days a week was corroborated by Morlatt. (Tr. 20, 134.-135).

[9] Sartor conceded that she clocked in late on numerous occasions, a fact confirmed by the Respondent's witnesses, Searce and Smith. (Tr. 52-54, 61-63, 145, 149-150, 162-163, 169; R. Exh. 1.) However, it was also undisputed that servers were instructed to wait until they were assigned their first table before clocking in. (Tr. 144-145.) Morlatt, on the other hand, unconvincingly testified that she was forced to promote her, even though she did not complete all of her side work, was "comping" meals, and was late, because she did not have another server to operate the computer at night. She concluded that line of questioning by insisting that Sartor was not even promoted and never actually got a wage increase, an incredible assertion contradicted by Searce and Smith. (Tr. 130-131, 152-154., 175-176.)

containing alcohol while the restaurant was still open and were ordered to empty the cups by Looper. There were also occasions when the night staff would drink on site after closing.[10]

Sartor and coworkers, including Megan Caliendo, Makayla Looper, Kayla Minkoff, Katie Jean Smith, and Brooke Shirey, often discussed and complained about side work not completed by the morning shift, such as rolling silverware into napkins, taking out the trash, or wiping down tables.[11] When these tasks were not completed by the morning shift, the evening shift had to finish them. This took away time from the tipped work of serving tables, "the work that [employees] were supposed to already be doing." Morlatt, on the other hand, would complain about the night staff not completing their side work. In fact, in a text message to Caliendo in the early morning of June 30, Morlatt railed at Caliendo about the "shitty" condition that night staff left the restaurant. In her expletive-filled rant, Morlatt said it was not the first time that this happened and if it happened again, the night shift would be called back to clean the restaurant.

C. Sartor Speaks up on Behalf of the Morning Shift

On Sunday, July 25, at 3:00 p.m., Chandler held an all-staff meeting in the party room in the back of the restaurant. In previous meetings, Chandler addressed the need of both shifts to complete their side work. Before this meeting started, Sartor spoke with Caliendo and Looper, another keyholder, regarding their concerns about the morning shift not completing their side work. Caliendo initially offered to bring the issue up at the meeting, but the group eventually decided that Sartor would do it.

Although most employees were present at the meeting, Morlatt was absent. Chandler began the meeting by going over her expectations for employees, including the performance of side work and employees' physical appearances. When she finished speaking, Chandler asked if there were any questions, and went around the room to each employee. When Chandler got to Sartor, Sartor complained that morning staff was not performing their side work, including taking out the trash, cleaning their tables, filling caddies, and rolling their silverware. Sartor added that, if night staff were held to Chandler's expectations to complete those tasks, the morning staff should be held to the same standards. Chandler nodded her head, said, "okay," and resumed going around the room to see what others had to say. The meeting lasted between an 60 to 90 minutes.[12]

Although they did not voice it during the meeting, some morning shift servers took offense at Sartor's comments about work distribution. Searce quickly called Morlatt to give her account of what Sartor said at the meeting. Morlatt became extremely angry.[13]

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[10] The record established that drinking while the restaurant was still open was a one-time event that Chandler learned about only recently. (Tr. 63-65, 195, 204-206.)

[11] Caliendo worked for the Respondent until September when she was terminated due to an incident with a coworker. She asserted that the Respondent showed favoritism towards the coworker. Nevertheless, I found Caliendo's testimony to be forthright, detailed, and spontaneous. (Tr. 72-73, 101-102.)

[12] It is undisputed that Sartor raised concerns at the meeting about the morning shift slacking on their side work. (Tr. 22-24, 84-87, 145-146, 194-195)

[13] Morlatt conceded that she reacted angrily to Sartor's comments. (Tr. 138-139.)

D. Sartor is Demoted

Afterwards, Sartor and six coworkers went to another local restaurant for dinner. At approximately 5:47 p.m., immediately after getting off the telephone with Searce, Morlatt text messaged Sartor:

> "I don't do anything huh bet what it looks like when I walk in is for now on gone be how it's left try me and Kennedy your card I need left ASAP. Your card need left ASAP."[14]

She also sent the same text message to the other employees but Caliendo replied that Sartor was not in that message thread. Thereafter, Morlatt and Sartor exchanged text messages exclusively. After Sartor asked what card she was referring to, Morlatt replied, "Your manager card."[15] Sartor then asked why and explained that she "wasn't saying you didn't do anything at all?" Morlatt replied:

> Because] your not a manager anymore your only supposed to be weekends after today we don't do weekend management except Makayla she's my weekend manager.

Sartor suggested a meeting with Chandler, and explained that she was simply responding to Chandler's request for Sartor's feedback when she "politely said that sometimes silverware gets forgotten about and caddies don't get refilled in the morning." Sartor recognized the difficulties faced by the morning staff with only two servers and said it was understandable that some tasks are overlooked. Morlatt would have none of it:

> I can run circles around your ass I do daily I watch cameras you sit and stand at that bar more than you work I never sit I clean I wait tables and I do shit that gets left every morning I've seen how shitty that building looks when I walk in I say sometime to you and guess what bam still doesn't get done I end up doing it.

After Sartor "respectfully disagreed," Morlatt posted a photograph of several hundred small tartar sauce containers that she had to fill the previous Friday morning, along with washing dirty urns, cutting pies, making cobblers, and waiting on customers. She concluded with a vague remark regarding camera footage and a comment that "a manager works harder than the rest." Sartor replied that she had been out of town but was sorry that Morlatt got stuck with so many tasks. After Morlatt replied that "it's every week for the past few months," Sartor insisted that she worked hard and prioritized everything that Morlatt would tell her to get done."[16]

After this text exchange with Morlatt, Sartor called Chandler. Sartor asked why Morlatt was sending these messages and whether it had anything to do with her comments at the meeting. Chandler replied that she "wasn't sure" why Morlatt sent the messages but would call Morlatt.

[14] GC Exh. 3.

[15] A manager's card enabled keyholder/managers to clock in as well as edit orders that had been placed and access certain information on Respondent's computerized point of sale system.

[16] GC Exh. 2, 4.

Chandler also added that she was not sure if she needed any managers or employees who were available only on weekends.[17]

E. Sartor is Terminated

Prior to returning to work on Friday, July 30, Sartor text messaged Morlatt requesting that she arrange for Sartor to clock in with her finger print or personal identification code because she inadvertently damaged her manager card in the washing machine. When Sartor arrived at work, however, she received an error message when she entered her code. Sartor walked over to Kayla Minkoff, the keyholder/manager for the shift, and asked if she changed Sartor's code. Minkoff pulled Sartor aside and informed her that she just got off the telephone with Chandler and Morlatt, who told her that Sartor was being terminated because they did not need a manager for one day a week. At the time, the Respondent was short-handed.

Sartor then asked Minkoff if her termination decision had anything to do with Sartor's statements at the July 25 staff meeting. Minkoff nodded her head in the affirmative. Sartor then went to her locker, packed up her personal items and left.[18] Sartor never received her final paycheck for the work week of July 24-30.[19]

LEGAL ANALYSIS

I. APPLICABLE LAW

Under Section 7 of the Act, employees have the right to engage in concerted activities for the purpose of "mutual aid or protection." *Allstate Maintenance, LLC,* 367 NLRB 68 (2019).

[17] In a written statement to a Board agent on September 3, Chandler expanded on the reasons for terminating Sartor to include tardiness, failure to complete side work, employees being uncomfortable around her, and giving a tee shirt to a coworker. In another written statement on March 4, 2022, Chandler said that Sartor no longer wanted to work weekends and asked for a one-day schedule. That assertion, based on uncorroborated double hearsay from Searce, was not credible. ((Tr. 120-125, 147.) Smith's testimony that she overheard Sartor tell other employees that she was going to cut down to Sunday work only was also not credible, as that assertion surfaced for the first time two weeks before the hearing, and in contrast to an earlier written statement she provided to the Board. (Tr. 179.) Morlatt's written statement to the Board also provided inconsistent reasons for terminating Sartor. Morlatt initially informed the Board that Sartor text messaged her asking to go down to one day a week. However, she failed to produce such evidence in response to subpoena duces tecum, and at the hearing she shifted course, saying that Sartor made the request verbally. The credible evidence established, therefore, that Sartor only requested a reduced schedule of two days per week. (Tr. 134-136.) In any event, neither Chandler nor Morlatt provided a plausible explanation as to why an employee who only worked on one busy night per week would undermine the Respondent's operations. (Tr. 34-38, 93-95, 109, 112.)

[18] The Respondent admitted that it was desperately short-handed at the time that it discharged Sartor. Chandler subsequently attempted to include tardiness among the reasons for terminating Sartor. She conceded, however, that she only recently learned of the drinking incidents, and that it was not a factor in Sartor's termination. (Tr. 222-225.)

[19] The parties disagree as to whether Sartor failed to pick up her last paycheck or Chandler refused to give it to her. However, I credit Caliendo's testimony that Sartor was not allowed on the premises and Chandler left whenever Sartor came to pick up her paycheck. In any event, Sartor was not paid for her final pay period. (Tr. 56-59, 95-96.)

"Section 8(a)(1) enforces this guarantee by deeming it 'an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise' of their § 7 rights." *MCPc, Inc. v. NLRB,* 813 F.3d 475, 482 (2016). Under *Wright-Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.,* 462 U.S. 393 (1983), in order to establish such a violation, the General Counsel bears the initial burden of establishing that an employee engaged in union or other protected concerted activity, the employer knew or such activity, and harbored animus, the evidence of which must support an inference of a causal relationship between the protected activity and the employer's adverse action. *Bannum Place of Saginaw, LLC,* 370 NLRB No. 117, slip op. at 3 (2021) (causal relationship found between employee's protected activity and discharge based on "timing of the discharge, cursory investigation, and disparate treatment").

Proof of union animus can be based on direct evidence or inferred from circumstantial evidence. *Tubular Corp. of America*, 337 NLRB 99 (2001). The Board does not require the General Counsel to produce direct of animus under *Wright-Line*. Animus toward an employee's protected activity may be inferred from the pretextual nature of an employer's proffered justification, as long as the surrounding facts support such an inference. *Electrolux Home Products*, 368 NLRB No. 34 slip op. at 3 (2019) (employee was discharged for insubordination, while the disciplinary records of other employees revealed that they were only warned or suspended for similar infractions). Similarly, when an employer presents shifting defenses for its actions, this too may be evidence of unlawful motive. *Taft Broadcasting Co.*, 238 NLRB 588, 589 (1978) (discriminatory motive inferred where none of the reasons given at hearing for employee's termination were communicated to her when she was terminated).

Once the General Counsel sustains her initial burden, the burden shifts to the employer to demonstrate that it would have taken the same action even in the absence of the protected activity. *Manor Care Health Servs.–Easton*, 356 NLRB 202, 204, 225–26 (2010), *enforced per curiam*, 661 F.3d 1139 (D.C. Cir. 2011) (citations omitted); *Wright Line*, 251 NLRB at 1089.

II. SARTOR'S PROTECTED CONCERTED ACTIVITIES

In *Myers Industries (Myers 1)*, 268 NLRB 493 (1984), and *Myers Industries (Myers 11)* 281 NLRB 882 (1986), the Board clarified that "concerted activities" protected by Section 7 are those "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." Generally, conduct becomes concerted when it is "engaged in with or on the authority of other employees," or when an employee seeks "to initiate or to induce or to prepare for group action." *Meyers II*, 281 NLRB at 887.

Sartor clearly engaged in protected concerted conduct when she complained about the morning shift at the July 25 all-hands meeting. Prior to July 25, Sartor and other night shift employees discussed their concerns regarding their work load, specifically, the additional tasks left to them by the morning shift's failure to complete side work tasks, like rolling silverware. On July 25, the group decided to take its concerns to management. After further discussion, the group decided that Sartor should raise them at the all-hands meeting that day, which she did. See *Quicken Loans, Inc.*, 367 NLRB 112 (2019) quoting *Meyers Industries*, 281 NLRB 882, 887 (1986) (*Meyers II*) (concerted activity includes cases "where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group

complaints to the attention of management."). See also *Salisbury Hotel, Inc.,* 283 NLRB 685, 687 (1987) (employee's call to Department of Labor grew out of employees' concerted protest of change in lunch hour policy, and was therefore a continuation of that concerted activity)

The fact that Sartor was the only one to speak up at the meeting about uncompleted side work by the morning shift was irrelevant. See *Parkview Lounge, LLC d/b/a Ascent Lounge*, 366 NLRB No. 71, slip op. at (2018), enfd. 790 Fed. Appx. 256 (2d Cir. 2019 (employee who spoke out to group about workplace concerns engaged in protected concerted activity). *Wal-Mart Stores, Inc.* 341 NLRB 796, 804 fn. 9 (2004), enfd. 137 Fed. Appx. 360 (D.C. Cir. 2005) (when a complaint is made to improve the working conditions of all employees it is a protected concerted activity), citing *Hanson Chevrolet*, 237 NLRB 584 (1978); *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB 151, 153 (2014) (employees need not agree with the message or join in an employee's cause for the communication itself to be concerted). Cf. *Bud's Woodfire Oven d/b/a Ava's Pizzeria*, 368 NLRB No. 45 slip op at 6 (2019) (employee's criticism of his restaurant manager's lack of assistance in the kitchen, a matter that employees merely joked about, was not concerted). The other employees' participation in the meeting was sufficient to render Sartor's statements concerted, even if none of them openly agreed with her comments.

III. ANIMUS FOR THE ADVERSE ACTION

A mountain of evidence revealed that Sartor was demoted and then terminated because she complained on July 25 about the additional work heaped on the night shift by the morning shift. See *Metro-West Ambulance Services*, 360 NLRB 1029, 1051 (2014) (animus against employee's protected activity can be shown by direct evidence, or inferred from circumstantial evidence). Although Chandler did not react to Sartor's protected statements, Morlatt, who was not present, heard about them soon thereafter. About two hours after the meeting ended, Morlatt text messaged Sartor denouncing her concerns and criticized Sartor's own performance. She concluded her message by ordering Sartor to hand in her keyholder/manager's card, effectively demoting her. She reached out to Chandler, who replied that she did not think that a part-time weekend manager was needed. The following Friday, when Sartor returned for her first shift after the group meeting and unsuccessfully attempted to clock in, she was informed of her termination.

The facts and circumstances established a clear connection between Morlatt's angry text message and demotion of Sartor, and Chandler's decision to terminate her. See *Bardon, Inc*., 371 NLRB No. 78, slip op. at 2 (2022) (animus in statements expressed by supervisor imputed to individuals who made decision to terminate employee based on those statements) (citations omitted). Moreover, the short amount of time between Sartor's protected speech and Morlatt's rant, about two hours, followed by her termination before Sartor's next shift five days later, demonstrated the Respondent's animus for the adverse actions. See *Conley Trucking*, 349 NLRB 308, 323 (2007) (discharge days after learning of union activity "highly suspicious"); *Electrolux Home Products Inc.*, supra, slip op. at 4, fn. 15 (citing *Relock Locomotives, Inc.*, 358 NLRB 229 (2012), enfd. 734 F.3d 764 (8th Cir. 2013) (discharge less than a month after public pro-union activity supported finding of animus); *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120, slip op. at 4 (protected activities six weeks before unlawful warning and termination evidence of animus), citing *Charter Communications, LLC*, 366 NLRB No. 46, slip op. at 7 (2018) (discharge within three months of violations due to union support and discharge evidence of animus).

In contrast, the Respondent presented only shifting or otherwise unconvincing explanations for the termination. See *Healthy Minds,* 371 NLRB No. 6, slip op. at 6 (2021) ("The Board has long held that shifting reasons constitute evidence of discriminatory motivation"). Initially, the Respondent asserted that Sartor was no longer needed because she would only be available one day a week. That contention, however, was not supported by credible, reliable evidence. The Respondent's pretext is further evident by its failure to confirm Sartor's availability with her before it let her go. See *Midnight Rose Hotel & Casino*, 343 NLRB 1003, 1005 (2004), enfd. 198 Fed. Appx. 752 (10th Cir. 2006) (employer's failure to ask employee to explain her actions before discharging her negated defense that employer reasonably believed that employee engaged in misconduct, and justified finding that employer did not act on such a belief).

The Respondent then shifted to the argument that Sartor was often late, failed to do her side work, gave out free store apparel, and drank on the job. Yet, Chandler never considered any of those alleged deficiencies when she agreed to demote and then terminate Sartor. She conceded as much since the Respondent, shorthanded and struggling to stay open, tolerated tardiness, unexcused absences, indiscretions, and mistakes that resulted in the voiding of customer charges.

Finally, magnifying the scope of the abundantly clear evidence of animus is the fact that Morlatt sent her text message berating Sartor for engaging in protected conduct and demoting her, not only to Sartor, but to several coworkers as well. The message to the night staff was clear: complaints about the morning shift would result in adverse consequences.

IV. THE RESPONDENT FAILED TO PROVE THAT IT WOULD DISCHARGED SARTOR IN THE ABSENCE OF HER PROTECTED CONCERTED CONDUCT

Since the overwhelming evidence established that the Respondent's demotion and termination of Sartor was motivated by animus toward her protected concerted conduct on July 25, the burden shifted to the Respondent to demonstrate by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct. See *Shamrock Foods Co*., 366 NLRB No. 117, slip op. at 26–27 (2018), and cases cited therein; Cf. *Michigan Bell Telephone Company,* 371 NLRB No. 63, slip op. at 2 (2022) (defense burden met by proving that employee would have "disciplined and, ultimately, discharged [employee] for his pattern of misconduct"). The employer, however, cannot meet its burden merely by showing it had a legitimate reason for its action; rather, it must show it would have taken the same action in the absence of the protected conduct. See *Bruce Packing Co*., 357 NLRB 1084, 1086-1087 (2011), enfd. in pertinent part 795 F.3d 18 (D.C. Cir. 2015); *Bally's Atlantic City*, 355 NLRB 1319, 1321 (2010) (where a prima facie case of discriminatory motivation is made, the respondent's rebuttal burden is substantial). The General Counsel may also offer proof that the employer's reasons for the personnel decision were false or pretextual. *Con-Way Freight, Inc*., 366 NLRB No. 183, slip op. at 2–3 (2018) (employer's reason for terminating employee was pretextual where it "manipulated the situation to trump up a disingenuous claim of falsification").

When, as here, the employer's stated reasons for its decision are found to be false or not in fact relied upon, discriminatory motive may be inferred. See *Shattuck Denn Mining Corp.,* 362 F.2d 466, 470 (9th Cir. 1966) (where stated motive for discharge is false, judge can infer that the "employer desires to conceal–an unlawful motive–at least where . . . the surrounding facts tend to reinforce that inference"). As explained above, the Respondent's explanations for discharging

Sartor on July 30 was based on the unsupported rumor that she wanted to work one day a week. As this litigation came to light, however, a variety of other causes for Sartor's termination surfaced – tardiness, giving away meals for free, voiding customer charges, and drinking on the job. Such performance deficiencies, however, were tolerated and never rose to the level of concern on Respondent's part. That is explained by the fact that the Respondent never applied discipline because it was significantly understaffed. Chandler's hands "were tied."

Having failed to refute the General Counsel's prima facie case of unlawful discrimination in demoting Sartor on July 25 and terminating her on July 30, the Respondent violated Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. The Respondent, Bebo's and Kathy's Cafe, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By demoting Kennedy Sartor on July 25, 2021 and subsequently terminating her on July 30, 2021 because she engaged in protected concerted activities, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

3. The unfair labor practices of the Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent violated Section 8(a)(1) by demoting and then discharging Kennedy Sartor because she engaged in protected concerted conduct, the Respondent shall be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent will be required to post a remedial notice in its restaurant. In addition, the Respondent shall be required to hold meetings during working hours at its restaurant, scheduled to ensure the widest possible attendance of employees, at which the remedial notice is to be distributed to employees and read aloud to employees by Chandler or Morlatt in the presence of a Board agent, or, at the Respondent's option, by a Board agent in the presence of management. *Gavilon Grain, LLC,* 371 NLRB No. 79, slip. op at 1 (2022).

The Respondent shall be ordered to offer Sartor reinstatement to her prior position and make her whole for any loss of earnings and other benefits incurred as a result of her unlawful termination. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons,* 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB 6 (2010). In accordance with *King Soopers, Inc.*, 364 NLRB No. 93 (2016), enfd. in relevant part 859 F.3d 23 (D.C. Cir. 2017), the Respondent shall also compensate Sartor for her reasonable search-for work and interim employment expenses, if any, regardless of whether those expenses exceed interim

earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons,* supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

Additionally the Respondent shall compensate Sartor for the adverse tax consequences, if any, of receiving lump-sum backpay awards, in accordance with *Tortillas Don Chaves*, 361 NLRB 101 (2014), and file with the Regional Director for Region 16, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year for each affected employee in *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016). The Regional Director will then assume responsibility for transmission of the report to the Social Security Administration at the appropriate time and in the appropriate manner. In addition, pursuant to *Cascades Containerboard Packaging*, 370 NLRB No. 76 (2021), the Respondent will file with the Regional Director for Region 16 a copy of each backpay recipient's corresponding W-2 form(s) reflecting the backpay award.

In addition to the requirement that the Respondent compensate Sartor for loss of earning and benefits, the General Counsel requests a remedy compensating her for all consequential damages she sustained because of the unfair labor practices. Such a remedy is described broadly as essentially covering economic loss not otherwise covered by a backpay award, and non-economic loss, including emotional distress and reputational injury. I recognize that the Board has "broad discretionary authority to fashion make-whole remedies that will best effectuate the policies of the Act." However, such a drastic expansion of the scope of the Board's make-whole remedies would be unprecedented and, therefore, I deny the application.

Finally, the General Counsel specifically requested only that the Respondent be directed to send a letter of apology to Sartor for each Section 8(a)(1) violation. I decline to do that. The infringement of employees' Section 7 rights can only be remedied with meaningful action. A remedial order can only do that if the violations are addressed by actions restoring employee's terms and conditions that have been infringed upon, and ensuring the violations do not occur again. Requiring the Respondent to tell Sartor that its sorry is not the role of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[20]

ORDER

The Respondent, Bebo's and Kathy's Café, Pilot Point, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging, demoting or otherwise discriminating against employees because they engage in protected concerted conduct.

[20] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Kennedy Sartor full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Kennedy Sartor whole for any loss of earnings and other benefits suffered as a result of the discrimination against her in the manner set forth in the remedy section of the decision.

(c) Compensate Kennedy Sartor for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 16, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year.

(d) Within 21 days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of Sartor's corresponding W-2 forms reflecting the backpay award.

(e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful demotion and discharge of Kennedy Sartor and, within 3 days thereafter, notify the employee in writing that this has been done and that the demotion and discharge will not be used against her in any way.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its restaurant in Pilot Point, Texas copies of the attached notice marked "Appendix."[21] Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized

[21] If the facilities are open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility is closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if the Respondent customarily communicates with its employees by electronic means. If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals

representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, text messaging, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 25, 2021.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated: Washington, D.C. June 28, 2022

Michael A. Rosas
Administrative Law Judge

Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT discharge, demote, or otherwise discriminate against any of you for engaging in protected concerted activities.

WE WILL not discipline, demote or discharge you because you bring work load concerns, or complaints to us on behalf of yourself and other employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make Kennedy Sartor whole for any loss of earnings and other benefits resulting from her demotion and subsequent discharge, less any net interim earnings, plus interest compounded daily.

WE WILL file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters.

WE WILL compensate Kennedy Sartor for the adverse tax consequences, if any, of receiving one (1) or more lump-sum backpay awards covering periods longer than one year.

WE WILL file a report with the Social Security Administration allocating backpay to the appropriate years.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful demotion and subsequent discharge of Kennedy Sartor, and WE WILL, within three (3) days thereafter, notify her in writing that this has been done and that the discharge will not be used against her in any way.

BEBO'S AND KATHY'S CAFE

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov

819 Taylor Street, Room 8A24, Fort Worth, TX 76102-6178
(817) 978-2921, Hours: 8:15 a.m. to 4:45 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/16-CA-280782 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER (682) 703-7489.